



July 10, 2002

The Hon. Marianne L. Horinko, Assistant Administrator
Office of Solid Waste & Emergency Response
5101T
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Comments in Response to USEPA Final Rule,
“Hazardous Waste Management System; Definition
of Solid Waste; Toxicity Characteristic” 67 Federal
Register 11,251 (March 13, 2002)

Dear Assistant Administrator Horinko:

Attached are National Mining Association's (NMA's) comments prepared in response to the Environmental Protection Agency's (EPA's or Agency's) March 13, 2002, direct final rule, "Hazardous Waste Management System; Definition of Solid Waste; Toxicity Characteristic" 67 Federal Register 11,251 (March 13, 2002). The final rule modifies the regulatory definition of solid waste under the Resource Conservation and Recovery Act (RCRA) and was promulgated "in response to vacatur ordered by the United States Court of Appeals for the District of Columbia Circuit in *Association of Battery Recyclers v. EPA* 208 F.3d 1047 (D.C.Cir.2000) ("*ABR*")." *Id.* at 11,252. In the preamble to the final rule, EPA announced that it had "decided to undertake a separate future rulemaking to propose additional revisions to its current recycling regulations". *Id.* The agency invited input from interested parties concerning that future EPA rulemaking.

NMA supports the March 13 rulemaking as an essential, albeit initial, step in bringing the regulatory definition of solid waste into conformance with opinions of the U.S. Court of Appeals for the D.C. Circuit in *ABR* and *AMC v. EPA* 824 F.2d 1177 (D.C. Cir.1987) ("*AMC I*"). Because the March 13 rulemaking is only a first step, NMA also supports the agency's announced intention of conducting further rulemaking to modify existing recycling regulations so as to encourage "increased reuse and recycling..., better resource conservation, and improved materials management overall." 67 FR 11252. NMA shares these goals and urges the agency to act with despatch on the necessary rulemaking.

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NMA emphasizes that, in light of the D.C. Circuit's decisions in *AMC I*, *ABR*, and *American Petroleum Institute v. EPA* 216 F.3d 50 (D.C. Cir. 2000) ("*API II*"); it is essential that EPA adopt a broad approach to modifying the regulatory definition of solid waste. In the wake of these cases, EPA is obligated to craft a regulatory definition of solid waste that recognizes that RCRA does not apply to the numerous materials generated and used by the primary mineral processing industry for the materials' mineral, acid, water or other values. These materials are not "abandoned, disposed of, or thrown away" and thus, since they are not discarded, they are not subject to regulation under RCRA.

To conform to the above D.C. Circuit holdings, it is necessary that the upcoming rulemaking adopt the "in use" paradigm described in the enclosed NMA comments. If the rulemaking is to achieve its goals of encouraging reuse and recycling, better resource conservation, and improved materials management, the rulemaking must avoid previous rulemakings' mistakes of focusing too narrowly on a single term in a court opinion, such as "immediate" in *AMC I*, or "continuous industrial process" in *ABR*.

Further, "in use" is not a concept that can logically or appropriately be confined to the use or reuse of a material within a single industry facility or mineral sector. If the regulatory definition of solid waste is to accord with the statute and the case law, then the upcoming rulemaking must also recognize that the "in use" paradigm includes shipments of materials from one industry facility to another industry facility, whether or not the facilities are in the same or different mineral sectors (e.g., copper, lead, zinc, precious metals), and whether or not the facilities are owned by the same entity.

NMA looks forward to working with you and your staff during the course of the upcoming rulemaking. If you have any questions about the enclosed NMA comments, please do not hesitate to call me at 202/463-9782.

Respectfully,



Roderick T. Dwyer

Enclosure

cc (w/enc)

Ms. Elizabeth Cotsworth, Director, Office of Solid Waste
Mr. Robert Dellinger, Director, Hazardous Waste Identification Division, OSW
Ms. Charlotte Mooney, Chief, Generator & Recycling Branch, HWID, OSW
Ms. Ingrid Rosencrantz, Generator & Recycling Branch, HWID, OSW
NMA Solid Waste Subcommittee

**NATIONAL MINING ASSOCIATION'S RESPONSE TO
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S FINAL
RULE, "HAZARDOUS WASTE MANAGEMENT SYSTEM; DEFINITION OF
SOLID WASTE; TOXICITY CHARACTERISTIC," 67 FED. REG. 11,251
(MARCH 13, 2002)**

I. INTRODUCTION

The National Mining Association (“NMA”) is the industry association representing the producers of most of the nation’s coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions and other firms serving the coal and hard rock mining industry. These comments are submitted in response to the Final Rule issued by the United States Environmental Protection Agency (“EPA” or “the Agency”) entitled “Hazardous Waste Management System; Definition of Solid Waste, Toxicity Characteristic,” 67 Fed. Reg. 11,251 (March 13, 2002) (“*ABR Rule*”).

As the Agency is aware, NMA’s interest in the regulatory definition of solid waste, the primary subject matter of the *ABR Rule*, dates back to the advent of the RCRA program. In the wake of *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000), NMA believes that it is time – finally – for EPA to craft a regulatory definition of solid waste that reflects the limits on EPA’s jurisdiction established by Congress in RCRA. NMA also believes that such a regulatory definition must respect RCRA’s statutory mandate, *i.e.*, EPA must not attempt to use definition of solid waste rulemakings to expand RCRA’s authority over products, which are not “discarded” and therefore not subject to EPA’s RCRA jurisdiction.

II. CONCLUSION

In the wake of *ABR*’s rejection of EPA’s regulatory definition of solid waste as it applies to the mining and mineral processing industry, EPA must adopt the Mineral Processing “In Use” Paradigm described below for the mining and mineral processing

industry.¹ Under this paradigm, materials produced from mineral processing operations remain in use in the primary metals production industry if they are reused for their mineral, acid, water, cyanide or other values in primary metal production operations. Those materials are not abandoned, disposed of or thrown away, and thus not discarded and not solid wastes under RCRA. A revised regulatory definition of solid waste that properly limits EPA's RCRA jurisdiction will also do much to encourage resource conservation and recovery, one of the primary goals of RCRA.

NMA emphasizes that whatever general changes are proposed by EPA regarding its regulatory definition of solid waste, *ABR* requires that for the materials at issue in *ABR*, *i.e.*, materials produced from mineral processing operations and reused in the primary metals production industry, the Mineral Processing "In Use" Paradigm be used as the basis for a revised rule. As a result, EPA's rulemaking must clarify that such materials do not fall within the categories of "secondary materials" previously found in EPA's regulatory definition of solid waste, *i.e.*, they are not "by-products," "sludges," or "spent materials," and the operations in which they are reused are primary metal production operations, not "reclamation."

Finally, at least in the case of materials produced and reused in the primary mineral processing industry, EPA must avoid an unlawfully narrow approach - such as one based on a "continuous industrial process" concept or a variant thereof - to the regulatory definition of solid waste. To do otherwise would be to misread the *ABR* decision as badly as previous misreadings of the term "immediate" in *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C.Cir.1987) ("AMC I").

¹ In these comments, the terms "primary metals production industry" is used interchangeably with "mining and mineral processing industry."

III. DESCRIPTION OF NMA MEMBER OPERATIONS

Since long before RCRA, miners in the United States have tried to maximize the recovery of valuable minerals from the ore they mine from the earth. Given the extractive nature of the industry, and the many tons of material that are moved every day, the volumes of material used as feedstock in primary metals production is far greater than other industries. All the minerals in the ore cannot be recovered in a single production process. In trying to maximize recovery of mineral values, the primary mining and mineral processing industry retains and uses valuable mineral-containing material in a series of ongoing production operations.

This goal was recognized by the D.C. Circuit in *AMC I*:

In the mining industry, primary metals production involves the extraction of fractions of a percent of a metal from a complex mineralogical matrix (i.e., the natural material in which minerals are embedded). Extractive metallurgy proceeds incrementally. Rome was not built in a day, and all metal cannot be extracted in one fell swoop. In consequence, materials are reprocessed in order to remove as much of the pure metal as possible from the natural ore ... valuable metal-bearing and mineral-bearing dusts are often released in processing a particular metal. The mining facility typically recaptures, recycles, and reuses these dusts, frequently in production processes different from the one from which the dusts were originally emitted.

AMC I, 824 F.2d at 1181. The United States mining industry's efforts to reuse all valuable materials are consistent with, and further, RCRA's resource recovery goal.

A. Primary Copper Production.

Using the copper sector as an example, ore is used as raw material in "pyrometallurgical" production sequences in copper mills and smelting furnaces or in "hydrometallurgical" copper heap leaching and solvent extraction/electrowinning

operations ("SX/EW"). At virtually every step of the production operations, materials with substantial value are generated other than the "product" produced by that production operation.

Copper-rich materials, including furnace refractory brick, acid plant solids, dusts and ashes, and "off-spec" copper anodes, are then used as feedstock in ongoing copper production. If the materials that are generated by production steps contain other valuable minerals, *e.g.* gold, silver, lead or molybdenum, they are sent to other types of primary metal production operations for use as feedstock.

As another example, acid streams from copper mineral processing operations (which in addition to their acid value may contain substantial copper value) are recirculated for use in copper heap leach production. These materials are generated from, remain part of, and are beneficially used in ongoing copper primary mining and mineral processing industry production operations.

B. Primary Precious Metals Production.

In precious metals primary metal production, there are many examples of reuse and recovery of metal and other values. These examples include:

Dore slag. As it cools and hardens, molten dore has attached to it a metal-bearing slag. That slag is broken off, gathered, and then processed for gold recovery by being ground and leached in tanks containing a cyanide solution. The resulting gold-rich slurry is sent to a carbon-in-leach ("CIL") circuit where it is mixed with other gold-bearing slurries.

Baghouse dust. Gold-bearing dusts generated in induction furnaces as part of the precious metals smelting process are captured, collected and stored. These gold-bearing

dusts can be smelted on site, but frequently are sent in sealed barrels to an off-site mineral processing facility that recovers the gold values by smelting.

Scrubber residues. These gold-bearing dusts and sludges are sent to a carbon-in-leach (CIL) production circuit for recovery of the metal values.

Retort cooling water. Water is used to cool and condense retort gases. In doing so, the water picks up metal values. The water is sent to a CIL production circuit both to recover these metal values and to use the water itself in beneficiation operations.

Non-contact cooling water. Cooling water that has not picked up metal values is itself still a valuable material. It can be - and is - reused in various places throughout the facility.

IV. ABR DECISION

On May 26, 1998, EPA issued the so-called "Phase IV Rule," 63 Fed. Reg. 28,556 (May 26, 1998), which substantially modified the federal regulatory definition of solid waste as it applied to the mining and mineral processing industry. EPA's Phase IV Rule fundamentally altered the federal regulatory definition of solid waste as it applied to what EPA described as "secondary materials," that were stored prior to their reuse in mining and mineral processing industry production operations. Under the "Phase IV Rule," storage of such materials was subject to full RCRA Subtitle C regulation, unless the terms of a "conditional exclusion" were met. Among other things, the conditional exclusion essentially forbade land storage of MPSM.

NMA challenged on a number of grounds EPA's "conditional exclusion" and its full Subtitle C regulation of MPSM stored on the land. NMA argued that EPA's new approach was unlawful because it relied upon a greatly expanded EPA interpretation of

its RCRA jurisdiction, and that EPA had exceeded its statutory authority by regulating materials that were not “discarded” and thus not “solid wastes” subject to regulation under RCRA.

Explaining its earlier ruling in *AMC I*, the *ABR* Court found that “Congress clearly and unambiguously expressed its intent that ‘solid waste’ (and therefore EPA’s regulatory authority) be limited to materials that are discarded by virtue of being disposed of, abandoned or thrown away.” *ABR* at 1051, citing *AMC I* at 1190. The *ABR* Court stated that “‘the Court in *AMC I* set aside EPA’s rule because secondary materials which are treated prior to recycling cannot be considered discarded if they are “reused within an ongoing industrial process.’ 824 F.2d at 1182.” *ABR*, at 1054. The *ABR* Court also stated that “under RCRA, material must be thrown away or abandoned before EPA may consider it to be a waste.” *ABR*, at 1053.

Rejecting the analytical underpinnings of EPA’s Phase IV Rule, the *ABR* Court said that “[S]econdary materials destined for recycling are obviously not of that sort [*i.e.*, not disposed of, abandoned or thrown away]. Rather than throwing those materials away, the producers save them; rather than abandoning them, the producer reuses them.” *ABR*, at 1051. The Court added that “material stored for recycling is plainly not” thrown away or abandoned: *ABR*, at 1053. In a particularly harsh repudiation of EPA’s position, the Court stated that “the *AMC I* court stressed, again and again, that it was interpreting discarded to mean what it ordinarily means. To say that when something is saved it is thrown away is an extraordinary distortion of the English language.” *Id.*

In *ABR*, the Court also rejected EPA’s “immediate reuse” test in the Phase IV Rule, under which EPA classified a material as discarded unless it was “immediately

reused.” In citing the *AMC I* opinion as support for striking down this test, the *ABR* Court said that “[n]othing here about saved materials being transformed into discarded materials unless they are placed back into the production process forthwith.” *Id.*

Finally, the *ABR* Court expressly rejected EPA’s claims that *American Petroleum Institute v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) (“*API*”) and *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) (“*AMC II*”) “sharply limited” the holding in *AMC I*. *ABR*, at 1054, 1055. Among other things, the Court stated that

The point of *AMC II*, and for that matter *API*, is that once material qualifies as “solid waste” [footnote omitted] something derived from it retains that designation even if it might be reclaimed and reused at some future time. In contrast, the Phase IV rule seeks to regulate materials that are not a by-product of solid waste, but a direct by-product of industrial process.

ABR, at 1056.

In the relief granted to NMA, the *ABR* Court ordered the following:

EPA must define solid waste in accordance with this opinion. The parenthetical (except as provided under 40 C.F.R. § 261.4(a)(17)) to the second sentence of 40 C.F.R. § 261.2(c)(3) through which EPA purportedly expanded its regulation of mineral processing secondary materials, is therefore set aside.

ABR, at 1060.

V. *API II* DECISION

In *American Petroleum Institute v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) (“*API II*”), the D.C. Circuit struck down the portion of the rule at issue that declined to exclude oil-bearing wastewater from the regulatory definition of solid waste because EPA had failed to engage in the “reasoned decisionmaking” required under the Administrative Procedure

Act. The *API II* Court cited *ABR* for the proposition that “EPA cannot regulate as solid waste secondary material destined for reuse as part of a continuous industrial process that is therefore “not abandoned or thrown away.” *API II* at 9, citing *ABR* at 1056. The Court added that “legal abandonment of property is premised upon the *intent to abandon*, which requires an inquiry into facts and circumstances [citations omitted].” *Id.* at 13, 14 (emphasis added).

In the factual context of *API II*, however, the Court saw a legitimate dispute over how the primary treatment of oil-bearing wastewater at issue should be classified: “[I]s it simply a step in the act of discarding? Or is it the last step in a production process before discard?” *API II*, at 5. The Court determined that EPA had not explained its decision that the oil bearing wastewater was discarded, and therefore vacated and remanded EPA’s decision that declined to exclude oil-bearing wastewater destined for primary treatment from the regulatory define.

VI. THE MINERAL PROCESSING “IN USE” PARADIGM

A. EPA’s Prior Paradigm.

EPA’s regulatory definition of solid waste as adopted in 1985, and as expanded in the Phase IV Rule, was based generally on the following EPA paradigm:

Industrial operations produce primary products (and something EPA referred to as “co-products”), which are not subject to RCRA regulation. All other materials produced from an industrial process were “secondary materials,” which EPA saw as subject to its jurisdiction under RCRA, unless EPA had adopted a specific regulatory exclusion or exemption.

This approach grew out of EPA’s mistaken contention, as expressed in its 1985 regulatory preamble, that “we [EPA] read the statute to state that hazardous secondary materials being recycled are wastes, and that we ordinarily have

jurisdiction to regulate most recycling activities involving these materials.” 50

Fed. Reg. 615, 617 (January 4, 1985).

The *ABR* decision is a total rejection of this EPA paradigm and EPA’s prior view of its jurisdiction under RCRA. In *ABR*, the Court reiterates *AMC I*’s admonition that RCRA mandates that only materials that are “abandoned, disposed of, or thrown away” are discarded and thus subject to EPA’s “hazardous waste” jurisdiction. EPA must abandon its earlier overbroad paradigm, and adopt a far more restructured view of its jurisdiction under RCRA.

B. The Mineral Processing “In-Use” Paradigm.

In the wake of *ABR*, EPA must adopt a new paradigm for the regulatory definition of solid waste as it applies to mining and mineral processing operations. With regard to materials produced from primary mineral processing production operations that are not “primary products” or “co-products” in EPA’s prior lexicon, the only relevant question under *ABR* in determining whether such a material is a solid waste is whether the material is still “in use” and therefore still part of primary metals production operations, or instead the material has crossed an imaginary “line of discard” and is now abandoned, being disposed of, or being thrown away. In making this determination as to whether a material is still “in use,” EPA must under *API II* evaluate the intent of a mineral processing facility to use that material versus to abandon it, dispose of it, or throw it away.

This analysis is referred to as the Mineral Processing “In Use” Paradigm. If a material has not crossed the imaginary line of discard referred to above, EPA has no RCRA jurisdiction over the material or the primary metals production operations using the material, and the material and such operations cannot be regulated under Subtitle C of RCRA. Regardless of the position EPA takes with other industries, the D.C. Circuit’s

ABR opinion and analysis mandates that this Mineral Processing "In Use" Paradigm must be applied to mining and mineral processing operations.

C. Materials "In Use" in the Primary Metal Production Industry Are Not "Wastes" Undergoing "Reclamation."

In implementing this Mineral Processing "In Use" Paradigm, EPA must recognize that materials generated from primary mineral processing industry production operations used for their mineral values in primary metals production are not "wastes" "recycled" in "reclamation" operations. 40 C.F.R. § 261.1 (c)(4). Instead, they are feedstocks used in ongoing primary metals production operations. As such, they and the production operations in which they are re-used are not subject to EPA's RCRA jurisdiction.

D. Materials "In Use" in the Primary Metals Production Industry Are Not Property Categorized as "By-Products," "Sludges" or "Spent Materials."

Materials produced from mineral processing operations and used for their acid, mineral, or water values in primary metal production operations are not "by-products," "sludges" or "spent materials," 40 C.F.R. § 261.1 (c)(1), (2), (3), as these terms are defined in EPA's regulatory definition of solid waste. Instead, they are products/raw materials/feedstocks used in ongoing mining and mineral processing operations. The three regulatory "categories," *i.e.*, "by-products," "sludges" and "spent materials" should be eliminated for materials that are "in use" in mineral processing operations. Pursuant to the *ABR* decision, EPA's final rule should be clear that these regulatory categories do not apply to materials that (1) are generated in mineral processing operations and (2) continue in use in metals and minerals production.

VII. IMPACT ON PRIMARY METALS PRODUCTION OPERATIONS

A. Implications of the Application of the Mineral Processing "In Use" Paradigm in the Primary Copper Sector.

Using the copper sector as an example, a number of materials produced from copper mineral processing production operations are reused for their mineral, acid, water or other values in primary copper production operations. Valuable copper-containing materials, including reverts, cobble, acid plant solids, dusts, ashes, furnace refractory brick, and "off-spec" copper anodes, are used as feedstock in various primary copper production operations. Moreover, acid streams when used in heap leaching operations, stored prior to leaching operations, and when used as part of on-site operations are also "in use." Under the Mineral Processing "In Use" Paradigm, all of these materials are in use, and these materials and the production operations in which they are used are not subject to EPA RCRA Subtitle C jurisdiction.

B. The Mineral Processing "In Use" Paradigm Should be Substituted for EPA's Term "Continuous Industrial Process" As Used in the ABR Rule.

In the *ABR* Rule, EPA states that:

For materials undergoing reclamation, in the proposed rule we expect to request comment on how interested parties would distinguish materials that are discarded from materials that remain in use in a continuous industrial process and anticipate proposing a definition of continuous industrial process.

67 Fed. Reg. 11,252. As stated above, under *ABR*, all materials generated from mineral processing operations that are used for their metal, acid or water value in the mining and mineral processing industry are not subject to EPA's RCRA jurisdiction. They remain "in use" under the Mineral Processing "In Use" Paradigm and have not crossed the "line of discard." In the mining and mineral processing industry, the Mineral Processing "In

Use” Paradigm should substitute for the “continuous industrial process” concept discussed by EPA in the *ABR* Rule.

NMA also cautions that EPA cannot and should not rely on the word “continuous” in the phrase “continuous industrial process” to interpret the *ABR* opinion narrowly. In the *ABR* opinion, the D.C. Circuit criticizes EPA for violating the judicial admonition that “the language of an opinion is not always to be parsed as though we were dealing with the language of a statute.” [citations omitted]. In numerous places in the opinion, the Court emphasizes that “ongoing” industrial processes are not subject to EPA’s RCRA jurisdiction. See e.g. *ABR* at 1054, citing *AMC I*, 824 F.2d at 1182. If EPA chooses to use the term “continuous production” or “ongoing production” in its proposed revision to the regulatory definition of solid waste, the agency must interpret these terms broadly, in the context of the *ABR* and *AMC I* opinions, to include all ongoing production where materials produced from mineral processing operations remain “in use.”

C. Materials That Are Stored Prior to Their Reuse in Primary Metals Production Operations Remain “In Use.”

With regard to materials stored prior to their reintroduction into industry production operations, these materials have not been discarded and, therefore, are not wastes. The continued use of valuable materials in ongoing mining and mineral processing industry production operations necessarily involves storage and accumulation of these materials. Operational constraints dictate what types of metal-bearing materials can be used as feedstock to maximize the efficiency and productivity of production units,

and when and in what amounts, meaning that these materials must be stored and accumulated as part of their use.²

These materials must also be stored for other production-oriented reasons. Certain materials, *e.g.*, dusts, are periodically collected in large volumes from production units, and then are used as feedstock over time in smaller increments. The same is true of furnace bricks, which are produced episodically as a result of maintenance activities, and then stored prior to being milled for reintroduction into the smelting process.

Other materials are used in batch productions operations, and stored until that production operation is performed. In addition, during shutdown periods, materials are stored. Finally, some materials must be stored prior to use in production operations to allow sampling.

Moreover, the method of storage under *ABR*, including whether materials are stored on the land, is irrelevant to the determination of whether a material remains in use in the primary metals production industry. EPA's position that it "may treat secondary materials as 'discarded' whenever they leave the production process and are stored for any length of time." *ABR*, at 1052, was the underlying principle of the Phase IV Rule, which was struck down by *ABR*. The *ABR* Court also rejected EPA's "part of the waste disposal problem" "test," which EPA used to support its prohibition on land storage.

For all of the above reasons, EPA's proposal regarding the regulatory definition of solid waste must recognize that the Mineral Processing "In Use" Paradigm includes materials stored prior to their reuse in primary metals production operations, includes

² See footnote 2 in *ABR*, 208 F.3d at 1054, which discusses "how temporary storage can be a necessary phase of reclaiming mineral processing secondary material" in the context of what is now Phelps Dodge's (the successor to Cyprus Amax Minerals Company) reuse of copper-containing reverts.

materials that are stored on the land and that these materials when stored are not subject to EPA's RCRA jurisdiction.

D. Materials Remain "In Use" When Used at Different Metals Production Facilities or in Different Metals Production Sectors.

Whether a material is used at the same primary metals production facility, or a different facility, or in the same primary metals production sector, or a different sector, is irrelevant to whether a material remains in use in the primary metals production industry. The *ABR* opinion explicitly recognizes that materials may move from primary metals production sector to sector. *ABR*, at 1053-1054. Therefore, any EPA rulemaking must recognize that materials produced at mineral processing operations and reused for their mineral, acid, water or other values, remain "in use" whether they are used at the same, or different, primary metals production facility and/or in the same, or different, primary metals production sector.

E. EPA's "Toxics Along for the Ride" Concept Is Inapplicable to "In Use" Materials in Primary Metals Production.

No "toxics along for the ride" ("TAR") analysis is relevant to whether a material is in use in the primary metals production industry. The only relevant question is whether material produced from mineral processing production operations is used (1) for mineral, acid or water value and (2) in primary metals production operations. Any TAR test for primary metals production operations would be unlawful under *ABR*, which recognizes that if materials are used for their mineral, acid or water value in ongoing primary metals production operations, EPA has no jurisdiction, regardless of the concentrations of "other" constituents.

Moreover, as a practical matter, in the course of mining and mineral processing operations, other constituents, *i.e.*, other naturally occurring metals become concentrated

in the materials produced from primary metal production operations. It is the existence of elevated levels of other metals in these materials that make them valuable for use as feedstock in ongoing primary metal production operations. They are not "toxics along for the ride," but valuable minerals that continue to be valuable to ongoing production operations.

VIII. ADDITIONAL MODIFICATIONS REQUIRED TO EPA'S REGULATORY DEFINITION OF SOLID WASTE POST-*ABR*.

A. EPA Should Modify the "Speculative Accumulation" Rules for The Primary Metals Production Industry.

EPA should modify its "speculative accumulation" rules for the mining and mineral processing industry. NMA believes that at some point in time material that is being stored for use, if not used, may cross the line of discard and become abandoned or disposed of. Given the operational realities of the mining and mineral processing industry, however, EPA's current speculative accumulation rules are too restrictive.

NMA proposes that EPA adopt an approach similar to Arizona. The State of Arizona applies a "75% recycle within one year" provision to determine if the material is "destined for recycling." At that point, the material crosses the imaginary line of discard and the material becomes a solid waste, and is then subject to the RCRA speculative accumulation provisions at 40 C.F.R. 261(c)(8).

B. Materials Produced From Mineral Processing Operations That Are Used As Substitutes For Products Placed On The Land Or That Are Used In Products Placed On The Land Are Not Abandoned, Thrown Away Or Disposed.

While the materials directly at issue in *ABR* were materials produced from mineral processing operations that EPA had previously classified as "sludges" and "by-products" that were being used in primary metals production operations that EPA

improperly characterized as reclamation, the *ABR* opinion goes much further in terms of its impact on EPA's regulatory definition of solid waste. In the relief granted by *ABR*, the Court states explicitly that, "EPA must define solid waste in accordance with this opinion," *ABR*, at 1060, meaning that EPA must adopt a regulatory definition of solid waste consistent with the limited view of EPA's jurisdiction set forth elsewhere in the *ABR* opinion.

Accordingly, EPA's definition of solid waste rulemaking as it regulates materials produced from mineral processing operations that are used as substitutes for products placed on the land or are used in products placed on the land should be modified to exempt these materials from EPA's RCRA jurisdiction. For example, to the extent that acids produced from mineral processing operations are used in products placed on the land, the acids and the end products are not subject to EPA's RCRA jurisdiction.

C. Materials Generated In Primary Metals Production Laboratory Operations That Are Reused Within The Industry For Their Acid, Mineral Or Water Values Are Not "Abandoned, Thrown Away Or Discarded."

In the mining and mineral processing industry, materials are generated in industry laboratory operations that are reused within the industry for their mineral values, including spent cupels from laboratories at gold operations. When these laboratory materials are reused in primary metals production operations for their mineral values, EPA's revised regulatory definition of solid waste should state that such materials are excluded from EPA's RCRA jurisdiction, regardless of whether EPA has previously described such materials as "uniquely associated" or not.

D. Use of Materials From Other Industrial Sectors in Primary Metals Production.

The mining and mineral processing industry can, and does, legitimately use materials from other industrial sectors for their mineral, acid or water value. By using these materials in primary metals production operations, NMA members further the statutory goals of resource conservation and resource recovery. When such materials are so used in primary metals products operations, they are not "abandoned, thrown away, or disposed of," and the materials and the production operations in which they are used are not subject to EPA's RCRA Subtitle C jurisdiction. EPA should amend its regulatory definition of solid waste such that such materials are not subject to EPA's RCRA Subtitle C jurisdiction.

E. Incidental Processing.

Whether or not a material generated from a mineral processing operation must undergo some form of minor processing to facilitate reuse is irrelevant to the basic question under *ABR*, i.e., is the intent of the facility to reuse the material, or is it rather to abandon, dispose of, or throw away the material? Accordingly, EPA's revised definition of solid waste rulemaking should be clear that materials produced from mineral operations processing that undergo minor processing to facilitate reuse are not subject to EPA's RCRA jurisdiction.